

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

9	SHERRIE L. HOYER,)	
10	Plaintiff,)	No. CV-05-0105-CI
11	v.)	ORDER DENYING PLAINTIFF'S
12	JO ANNE B. BARNHART,)	MOTION FOR SUMMARY JUDGMENT
13	Commissioner of Social)	AND DIRECTING ENTRY OF
14	Security,)	JUDGMENT FOR DEFENDANT
15	Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 12, 15) submitted for disposition without oral argument on November 28, 2005. Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney David R. Johnson represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

Plaintiff, 52-years-old at the time of the administrative decision, protectively filed an application for Supplemental Security Income benefits (SSI) on December 4, 2000, alleging

1 disability as of June 1973¹ due to neck, back, and hip injuries,
2 depression, arthritis and tendinitis. (Tr. at 119.)

3 Plaintiff, who was 5'5" tall, 175 pounds, divorced with no
4 dependent children, was 52-years-old at the time of the hearing.
5 (Tr. at 49.) She graduated from high school and participated in a
6 CETA clerical training program in 1982 followed by one year of
7 college in 1998. She had past work as an office assistant, food
8 server and cook. Following a denial of benefits at the initial
9 stage and on reconsideration, a hearing was held before
10 Administrative Law Judge Richard Hines (ALJ). The ALJ denied
11 benefits; review was denied by the Appeals Council. This appeal
12 followed. Jurisdiction is appropriate pursuant to 42 U.S.C. §
13 405(g).

14 ADMINISTRATIVE DECISION

15 The ALJ concluded Plaintiff had never engaged in substantial
16 gainful activity and had generalized pain complaints,² but the
17 impairment did not meet the Listings. The ALJ rejected Plaintiff's
18 testimony as not fully credible. (Tr. at 21.) The ALJ concluded
19 Plaintiff retained the residual capacity to perform a wide range of
20 light work, including past work as a food server and office
21 assistant; alternatively, under the Grids, the ALJ also concluded
22 Plaintiff was not disabled.

23
24 ¹The applicable period at issue based on the date of the SSI
25 application is December 2000.

26 ²There is no challenge Plaintiff's mental impairments were not
27 severe and the medical record supports such a finding. (Tr. at 185,
28 331.)

1 **ISSUES**

2 The question presented is whether there was substantial
3 evidence to support the ALJ's decision denying benefits and, if so,
4 whether that decision was based on proper legal standards.
5 Plaintiff contends the ALJ improperly rejected the opinions of the
6 treating and examining physicians without sufficient reasons and
7 improperly rejected Plaintiff's testimony as not credible.

8 **STANDARD OF REVIEW**

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
10 court set out the standard of review:

11 The decision of the Commissioner may be reversed only if
12 it is not supported by substantial evidence or if it is
13 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
14 1097 (9th Cir. 1999). Substantial evidence is defined as
15 being more than a mere scintilla, but less than a
16 preponderance. *Id.* at 1098. Put another way, substantial
17 evidence is such relevant evidence as a reasonable mind
18 might accept as adequate to support a conclusion.
19 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
20 evidence is susceptible to more than one rational
21 interpretation, the court may not substitute its judgment
22 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
23 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599
24 (9th Cir. 1999).

25 The ALJ is responsible for determining credibility,
26 resolving conflicts in medical testimony, and resolving
27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
28 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

29 **SEQUENTIAL PROCESS**

30 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
31 requirements necessary to establish disability:

32 Under the Social Security Act, individuals who are
33 "under a disability" are eligible to receive benefits. 42
34 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
35 medically determinable physical or mental impairment"
36 which prevents one from engaging "in any substantial
37 gainful activity" and is expected to result in death or

1 last "for a continuous period of not less than 12 months."
2 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
3 from "anatomical, physiological, or psychological
4 abnormalities which are demonstrable by medically
5 acceptable clinical and laboratory diagnostic techniques."
6 42 U.S.C. § 423(d)(3). The Act also provides that a
7 claimant will be eligible for benefits only if his
8 impairments "are of such severity that he is not only
9 unable to do his previous work but cannot, considering his
10 age, education and work experience, engage in any other
11 kind of substantial gainful work which exists in the
12 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
13 the definition of disability consists of both medical and
14 vocational components.

15 In evaluating whether a claimant suffers from a
16 disability, an ALJ must apply a five-step sequential
17 inquiry addressing both components of the definition,
18 until a question is answered affirmatively or negatively
19 in such a way that an ultimate determination can be made.
20 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
21 claimant bears the burden of proving that [s]he is
22 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
23 1999). This requires the presentation of "complete and
24 detailed objective medical reports of h[is] condition from
25 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
26 404.1512(a)-(b), 404.1513(d)).

27 ANALYSIS

28 1. Examining and Treating Physician

Plaintiff contends the ALJ erroneously rejected the findings of
treating physician Dr. Greg Sharp, who treated her from July 20,
1998, through at least October 17, 2003. Dr. Sharp opined Plaintiff
had experienced very high levels of pain and her condition was not
expected to improve. (Tr. at 433.) Dr. Sharp also noted in 2002
that Plaintiff had positive 17 of 18 trigger points to support a
diagnosis of fibromyalgia. (Tr. at 435.) Plaintiff also contends
the ALJ erroneously rejected the opinion of examining physician, Dr.
Robert Rose. In May 2003, Dr. Rose diagnosed Plaintiff with
polyarthralgia and polymyalgia, related to repetitive trauma,
impairments that limited her to standing or walking less than two
hours and sitting less than six hours in an eight-hour work day.

1 (Tr. at 438, 440.) Plaintiff contends the ALJ failed to provide
2 sufficient reasons to reject these opinions. Defendant responds the
3 ALJ properly considered and rejected the opinions as being
4 inconsistent with treatment notes and activities of daily living.

5 In a disability proceeding, the treating physician's opinion is
6 given special weight because of his familiarity with the claimant
7 and his physical condition. See *Fair v. Bowen*, 885 F.2d 597, 604-05
8 (9th Cir. 1989). If the treating physician's opinions are not
9 contradicted, they can be rejected only with "clear and convincing"
10 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If
11 contradicted, the ALJ may reject the opinion if he states specific,
12 legitimate reasons that are supported by substantial evidence. See
13 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463
14 (9th Cir. 1995); *Fair*, 885 F.2d at 605. While a treating
15 physician's uncontradicted medical opinion will not receive
16 "controlling weight" unless it is "well-supported by medically
17 acceptable clinical and laboratory diagnostic techniques," Social
18 Security Ruling 96-2p, it can nonetheless be rejected only for
19 "'clear and convincing' reasons supported by substantial evidence in
20 the record." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir.
21 2001) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.
22 1998)). Furthermore, a treating physician's opinion "on the
23 ultimate issue of disability" must itself be credited if
24 uncontroverted and supported by medically accepted diagnostic
25 techniques unless it is rejected with clear and convincing reasons.
26 *Holohan*, 246 F.3d at 1202-03. Historically, the courts have
27 recognized conflicting medical evidence, the absence of regular
28 medical treatment during the alleged period of disability, and the

1 lack of medical support a doctor's report based substantially on a
2 claimant's subjective complaints of pain, as specific, legitimate
3 reasons for disregarding the treating physician's opinion. See
4 *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604.

5 In addressing Dr. Sharp's opinion, the ALJ noted:

6 Similarly, the blanket statements of disability dated
7 October 24, 2002, and November 21, 2002, by Gregory Sharp,
8 DO, . . . are benign in content, and are not supported by
9 the medical evidence. And his statement of "an advanced
10 case of fibromyalgia" with "17 of the 18 trigger points"
is also not supported by any other documentary evidence,
and is not supported by the overall evidence of record.
And more importantly, is contrary to all other medical
opinion evidence of record.

11 (Tr. at 20.) With respect to the limitations noted by Dr. Rose, the
12 ALJ commented:

13 In this case, the undersigned finds that based on the
14 evidence of record, there is simply no underlying
15 impairment of any real significance to sufficiently
16 explain or produce the pain and limitations that she
17 complains of, specifically a limited sitting capacity and
18 an inability to stand or walk for prolonged periods. [Tr.
19 at 439.] According to the evidence of record, the
20 claimant has sought treatment for generalized pain and
21 fatigue complaints since 1997 with no determinable
etiology. Physical examinations have been unremarkable,
and diagnostic image testing have demonstrated minimal
findings. She did report improvement with physical
therapy, and her pain complaints were eventually listed as
myofascial pain syndrome and somatic dysfunction, denoting
unrealistic and a preoccupation with physical
symptomatology.

22 (Tr. at 21.)

23 The ALJ also relied on the testimony of the medical consultant,
24 Dr. Almquist, who rejected the diagnosis of fibromyalgia, noting Dr.
25 Sharp had not examined Plaintiff for the presence of pain at control
26 points. (Tr. at 46.) Dr. Almquist also remarked with respect to
27 the limitations noted by Dr. Rose in October 2003, that examination
28 findings were normal and Plaintiff's system complex exceeded the

1 physical findings in all modalities. (Tr. at 47, 438-439.)

2 The opinion of a non-examining physician may be accepted as
3 substantial evidence if it is supported by other evidence in the
4 record and is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035,
5 1043 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th
6 Cir. 1995). The opinion of a non-examining physician cannot by
7 itself constitute substantial evidence that justifies the rejection
8 of the opinion of either an examining physician or a treating
9 physician. *Lester*, at 831, citing *Pitzer v. Sullivan*, 908 F.2d 502,
10 506 n.4 (9th Cir. 1990). Cases have upheld rejection of an
11 examining or treating physician based in part on the testimony of a
12 non-examining medical advisor; but those opinions have also included
13 reasons to reject the opinions of examining and treating physicians
14 that were independent of the non-examining doctor's opinion.
15 *Lester*, at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55
16 (9th Cir. 1989) (reliance on laboratory test results, contrary
17 reports from examining physicians and testimony from claimant that
18 conflicted with treating physician's opinion); *Andrews*, 53 F.3d at
19 1043 (conflict with opinions of five non-examining mental health
20 professionals, testimony of claimant and medical reports); *Roberts*
21 *v. Shalala*, 66 F.3d 179 (9th Cir 1995) (rejection of examining
22 psychologist's functional assessment which conflicted with his own
23 written report and test results). Thus, case law requires not only
24 an opinion from the consulting physician, but also substantial
25 evidence (more than a mere scintilla, but less than a
26 preponderance), independent of that opinion which supports the
27 rejection of contrary conclusions by examining or treating
28 physicians. *Andrews*, 53 F.3d at 1039.

1 The reasons provided by the ALJ for rejecting the fibromyalgia
2 diagnosis by Dr. Sharp and limitations noted by Dr. Rose are
3 specific and legitimate and supported by the record. Additionally,
4 Dr. Almquist's opinion is consistent with the record.

5 In 1998, Plaintiff had physical therapy for treatment of pain
6 in her right elbow and numbness and tingling in her hand. There was
7 no evidence of atrophy, spasm, and notations of full range of motion
8 and symmetrical reflexes. (Tr. at 164.) Physical therapy assisted
9 the pain. (Tr. at 162.) Plaintiff continued to do well overall and
10 was enjoying her classes. (Tr. at 199.)

11 Plaintiff continued to seek medical treatment for sporadic
12 complaints of pain in her back, neck and shoulder in 1999 and again
13 in 2000 following a motor vehicle accident on March 28, 2000. (Tr.
14 at 209, 253, 280.) Shoulder pain improved with physical therapy in
15 February 2000 and a somatic component was noted. (Tr. at 288, 289.)
16 It appears the residuals from the motor vehicle accident resolved by
17 May 2000. (Tr. at 275.) Other medical appointments during the
18 later months of 2000 included treatment for kidney stones,
19 vaginitis, allergies, ear infections, rhinitis, and surgery to
20 repair a nasal septal deviation. (Tr. at 317.)

21 In January 2001, Plaintiff again complained of pain in her
22 elbow, shoulder, back and neck. (Tr. at 318. 321.) It was noted
23 the overall bio-mechanics of her spine were fair. (Tr. at 327.) No
24 further treatment was provided until October 2001 when trigger point
25 injections were done for left hip pain. (Tr. at 367.) There was
26 full range of motion of the hip and Plaintiff reported a noticeable
27 improvement in November 2001. (Tr. at 369.) In December, Plaintiff
28 sought treatment for pain in her upper back, neck and right

1 posterior shoulder after a slip and fall on the ice. (Tr. at 373.)
2 At that time Plaintiff was diagnosed with myofascial pain syndrome
3 with a somatic dysfunction. Injections and physical therapy were
4 recommended and provided during December and January. Improvement
5 was noted on January 9, 2002. (Tr. at 388.)

6 In June 2002, Plaintiff reported a flare-up of pain after
7 several months of feeling well. (Tr. at 398.) On August 26, 2002,
8 Plaintiff reported more time was occurring between pain episodes.
9 (Tr. at 405.) Then, in October and November, Dr. Sharp diagnosed
10 fibromyalgia with little chance of improvement; that diagnosis was
11 made following injection treatments in September and October with
12 little improvement noted. (Tr. at 444, 445.) The diagnosis was not
13 supported by further examination.

14 There were no treatment notes in November and December until
15 after Plaintiff injured herself at the end of December while trying
16 to start a fire. She reported the injury caused pain and numbness
17 in her shoulders, neck, and arms. An examination revealed normal
18 gait, full range of motion, and normal bilateral strength. (Tr. at
19 456.) She was given an injection. (Tr. at 456.) At an appointment
20 on January 24, 2003, no complaints were made regarding neck or back
21 pain. (Tr. at 457.) She was treated with injections for complaints
22 of pain in her neck in June 2003 after cleaning her patio. (Tr. at
23 458.) No further mention of neck and shoulder pain was made until
24 October 17, 2003; an injection was provided and Plaintiff was
25 diagnosed with a cervical spine somatic dysfunction. (Tr. at 462.)

26 Thus, it appears although Plaintiff has been treated over the
27 years for back, neck and shoulder pain, that treatment has been
28 sporadic and conservative, and, at times, with reference to somatic

1 complaints. Thus, the ALJ's reasons for rejecting Dr. Sharp's
2 diagnosis of fibromyalgia are specific and legitimate and supported
3 by the treatment record.

4 Additionally, his rejection of the functional limitations noted
5 by Dr. Rose was also supported by specific and legitimate reasons.
6 Dr. Rose in his examination noted the functional limitations were
7 based on voluntary input or lack thereof, that Plaintiff's symptom
8 complex exceeded the physical findings in all modalities, there were
9 no obvious findings of joint or vascular abnormalities, and a
10 functional capacities examination would be required to determine
11 maximum residual capacity. (Tr. at 438-440.)

12 The ALJ concluded Plaintiff was able to perform a full range of
13 light and sedentary work based on an ability to sit, stand or walk
14 for two hour intervals with normal breaks, up to six hours a day per
15 activity. He found she can lift 20 pounds occasionally and ten
16 pounds frequently. (Tr. at 22.) She was found to be limited to
17 only occasional overhead activities based on upper extremity and
18 neck pain complaints. Based on this functional capacity, Plaintiff
19 has the ability to perform her past work as a food server and/or
20 office assistant. Alternatively, using the Grids as a framework,
21 Plaintiff would not be considered disabled. 20 C.F.R. Subpart P,
22 App. 2, 202.14, 15. This is consistent with Plaintiff's daily
23 activities: she reads, listens to music, watches television,
24 provides care for her children, attends church and eats out on
25 occasion, walks ½ mile two to three times a week. She has not had
26 hospitalizations since December 2000 and has not taken anti-
27 depressant drugs since that time. (Tr. at 55, 57.) She does not
28 drive because her license was suspended. Light and sedentary work

1 is consistent with findings in 1997 (Tr. at 173-74) and less than
2 the medium work recommended by Dr. Almquist. Thus, there is
3 evidence to support the ALJ's findings.

4 2. Credibility

5 Plaintiff contends the ALJ erroneously rejected her testimony
6 as not fully credible. She notes she was unable to work because of
7 constant pain that became worse as the day wore on, lack of
8 concentration, and severe fatigue. (Tr. at 53.) Plaintiff stated
9 she did not wash the dishes or make beds and that she seldom
10 vacuumed, and did no yard work or gardening. (Tr. at 56.) Thus, she
11 maintains her activities were consistent with disability.

12 In deciding whether to admit a claimant's subjective symptom
13 testimony, the ALJ must engage in a two-step analysis. *Smolen v.*
14 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step,
15 see *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986), the
16 claimant must produce objective medical evidence of underlying
17 "impairment," and must show that the impairment, or a combination of
18 impairments, "could reasonably be expected to produce pain or other
19 symptoms." *Id.* at 1281-82. If this test is satisfied, and if there
20 is no evidence of malingering, then the ALJ, under the second step,
21 may reject the claimant's testimony about severity of symptoms with
22 "specific findings stating clear and convincing reasons for doing
23 so." *Id.* at 1284. The ALJ may consider the following factors when
24 weighing the claimant's credibility: "[claimant's] reputation for
25 truthfulness, inconsistencies either in [claimant's] testimony or
26 between [his/her] testimony and [his/her] conduct, [claimant's]
27 daily activities, [his/her] work record, and testimony from
28 physicians and third parties concerning the nature, severity, and

1 effect of the symptoms of which [claimant] complains." *Light v. Soc.*
2 *Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If the ALJ's
3 credibility finding is supported by substantial evidence in the
4 record, the court may not engage in second-guessing. *See Morgan v.*
5 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). If
6 a reason given by the ALJ is not supported by the evidence, the
7 ALJ's decision may be supported under a harmless error standard.
8 *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990) (applying the
9 harmless error standard); *Booz v. Sec'y of Health and Human Serv.*,
10 734 F.2d 1378, 1380 (9th Cir. 1984) (same). There is no evidence of
11 malingering. (Tr. at 331.) Thus, Plaintiff's testimony must be
12 rejected with clear and convincing reasons.

13 In addition to his finding there were no objective findings to
14 support the diagnosis of fibromyalgia and functional limitations
15 noted by Dr. Rose, the ALJ stated:

16 Despite citing on-going pain complaints, the claimant
17 confirmed at hearing that she continued to be independent
18 in her activities of daily living, took walks, watched
19 television, and with her daughter's help, continued to
engage in household chores including cooking, cleaning and shopping.

20 (Tr. at 22.) Additionally, the ALJ found only conservative
21 treatment had been recommended and improvement had followed the
22 treatment.

23 This court concludes Plaintiff has not met the first prong of
24 the *Cotton* test, that is, objective evidence to support the
25 existence of an underlying impairment other than mild degenerative
26 disc disease and, given her age, a certain degree of degenerative
27 arthrosis. Additionally, there was evidence of a somatic
28 preoccupation with physical symptomatology. Finally, if the first

1 prong is met, there is evidence Plaintiff's daily activities were
2 inconsistent with disability. She provided daily childcare for her
3 children, drove them to school, shopped, cooked, did errands, light
4 housework, socialized daily, and had good concentration and
5 persistence. (Tr. at 331-332.) Thus, the ALJ did not err in
6 rejecting Plaintiff's complaints of disabling pain. Accordingly,

7 **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
9 **DENIED.**

10 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
11 **Rec. 15**) is **GRANTED**; Plaintiff's Complaint and claims are **DISMISSED**
12 **WITH PREJUDICE.**

13 3. The District Court Executive is directed to file this
14 Order and provide a copy to counsel for Plaintiff and Defendant.
15 The file shall be **CLOSED** and judgment entered for Defendant.

16 DATED January 9, 2006.

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18 S/ CYNTHIA IMBROGNO
19 UNITED STATES MAGISTRATE JUDGE
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